UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

MICHAEL BERRY, Individually and on behalf of all others similarly situated,	& & & & & & & & & & & & & & & & & & &	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 13-cv-02443
	§	
KIOR, INC., FRED CANNON, and	§	
JOHN K. KARNES,	§	
	§	
Defendants.	§	
	§	
	§	

<u>DEFENDANTS FRED CANNON AND JOHN KARNES'S STATEMENT IN RESPONSE</u> <u>TO THE COURT'S NOVEMBER 14, 2014 ORDER</u>

Pursuant to the Court's Order of November 14, 2014 (Dkt. 77), Defendants Fred Cannon and John Karnes (the "Individual Defendants") provide this statement explaining their position regarding the impact of the KiOR bankruptcy stay on the claims in this action against the Individual Defendants. The Individual Defendants also address Plaintiffs' latest last-minute attempt to delay a hearing on the Individual Defendants' pending motions to dismiss and Plaintiffs' request to file a *fifth* pleading – where the sufficiency of the prior four have not been adjudicated.

A. The Individual Defendants do not seek at this time to extend the automatic stay

The Individual Defendants are not seeking to stay this matter at the present time.

Although there are factors that the Individual Defendants believe could justify extending the

automatic stay or asking this Court to exercise its discretion to stay the case, those factors are not implicated at this juncture of the case -i.e., where a motion to dismiss is pending and discovery is stayed. Accordingly, while the Individual Defendants are not presently seeking to extend the automatic stay or otherwise stay the claims against them, they reserve the right to do so at a later date.

B. Plaintiffs' second consecutive last-minute request to delay oral argument and to amend the Complaint should be denied

This case was filed 15 months ago. In that time, Plaintiffs have filed three complaints and are currently seeking leave to file a fourth. These repeated amendments and requests have required the Individual Defendants fully to brief two motions to dismiss and an opposition to motion for leave to file a supplemental or amended complaint. Now, Plaintiffs seek leave to amend yet again.

Plaintiffs followed this same pattern before the last scheduled oral argument (set for September 26, 2014), seeking to delay it by filing a motion to supplement or amend, notice of which they provided only 10 business days in advance. Remarkably, after yet another round of briefing on the motion which remains pending, Plaintiffs are now attempting the same tactic again.

Plaintiffs informed the Individual Defendants <u>three business days</u> before the currently scheduled hearing of their latest anonymous witness and their intent to seek leave to amend. Indeed, when counsel met and conferred just one day earlier about the response to the Court's November 14 Order, Plaintiffs did not give any indication of their intent to amend. Plaintiffs do not state when they obtained their new information, or why they could not have obtained it earlier, only that they did so "[s]ubsequent to filing the Motion for Leave" – *i.e.*, two months ago

on September 24, 2014. All of this comes *months* after Plaintiffs had already filed the Second Amended Complaint in lieu of responding to the Individual Defendants' first fully brief motion to dismiss.

Moreover, this proposed new pleading appears to be an effort to plead an entirely new case, or at least new theory of this case, containing different allegations against a different set of defendants covering a different class period. At some point Plaintiffs' amend-and-delay tactics must be stopped. The Individual Defendants are entitled to have their challenges to the pleading tested according to the Federal Rules and the PSLRA.

Of Counsel:

(admitted *pro hac vice*)
Michael G. Bongiorno
Peter I. Kolovos

Peter J. Kolovos Peter A. Spaeth

Gregory D. Chisholm

Alexandra C. Boudreau

WILMER CUTLER PICKERING

HALE AND DORR LLP

60 State Street

Boston, Massachusetts 02109

Telephone: (617) 526-6000 Fax: (617) 526-5000

michael.bongiorno@wilmerhale.com

Respectfully submitted,

/s/ David D. Sterling

David D. Sterling

Attorney-In-Charge Texas Bar No. 19170000

Federal I.D. No. 07079

Federal I.D. No. 0/0/9

Cristina Espinosa Rodriguez Texas Bar No. 00793701

Federal I.D. No. 20575

Federal I.D. No. 20575

BAKER BOTTS LLP

One Shell Plaza, 910 Louisiana Street

Houston, Texas 77002

Telephone: (713) 229-1234

Fax: (713) 229-1522

cristina.rodriguez@bakerbotts.com

Attorneys for Defendant Fred Cannon

Of Counsel:

Wallis M. Hampton State Bar No. 00784199 Federal Bar No. 16123 SKADDEN, ARPS, SLATE, /s/ Noelle M. Reed

Noelle M. Reed Attorney-in-Charge

State Bar No. 24044211

Federal Bar No. 27139

1000 Louisiana Street, Suite 6800

MEAGHER & FLOM LLP 1000 Louisiana Street, Suite 6800 Houston, Tayas 77002

Houston, Texas 77002

Telephone No.: 713-655-5116 Facsimile No.: 713-483-9116

Email: wallis.hampton@skadden.com

Houston, Texas 77002

Telephone No.: 713-655-5122 Facsimile No.: 713-483-9122 Email: noelle.reed@skadden.com

Attorneys for Defendant John Karnes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served electronically on all counsel of record on this 23 day of November, 2014.

/s/ Gregory D. Chisholm

Gregory D. Chisholm